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IN THE

Supreme Court of the United States

October Term, 1967

No. 585

PAUL H. SCHWEITZER AND
FRIEDEL SCHWEITZER,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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"[s]uch an issue of necessity requires a practical approach, all pertinent *facts* and circumstances being open to inspection and consideration regardless of their objective or subjective nature." (Emphasis added) 6

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled matter on the 14th day of April, 1967.

Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 376 F(2d) 30 (Appendix B, 1b).

The memorandum of findings of fact and opinion of the Tax Court of the United States is reported at T.C. Memo. 1965-308 (R. 47).*

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* References designated "R" are to the record prepared for the Court of Appeals.

Statement of Jurisdiction

The judgment of the Court of Appeals was made and entered on April 14, 1967 (Appendix B, 3b).

There was no motion or order respecting a rehearing. There was a motion and Order granting an extension of time within which to petition for certiorari, to and including September 10, 1967.

The jurisdiction of this Court is conferred by Sec. 7482(a) of the Internal Revenue Code of 1954, and 28 U.S.C. Sec. 1254(1).

The jurisdiction of the Court of Appeals is found in the Internal Revenue Code of 1954 Sec. 7482(a), and 28 U.S.C. Sec. 1254(1).

The jurisdiction of the Tax Court of the United States is found in the Internal Revenue Code of 1954, Sec. 7442.

Questions Presented for Review

1. Did the Court of Appeals err in declining to find that there existed a claim for reimbursement for petitioner's nationalized properties in the year of their nationalization?

2. Did the Court of Appeals err in declining to find that by adjudication of that claim it was ascertained with reasonable certainty that such reimbursement will be received?

3. Did the Court of Appeals err in declining to find that the said adjudication did qualify the said reimbursement as one with respect to which there was a reasonable prospect of recovery in the year of nationalization?

4. Did the Court of Appeals err by deciding that petitioner Paul H. Schweitzer had to deduct the loss arising

out of the nationalization of his assets in the year of nationalization, instead of in the year his claim for reimbursement had been adjudicated?

5. Where Section 1.165-1(d)(2)(i)[1] of the Income Tax Regulations leaves no doubt that the loss from Communist nationalization is tax deductible, either in the year of nationalization or in the year of adjudication, did the Court of Appeals err by affirming the Tax Court in disallowing said deduction in the year of adjudication, whereas the cited Section disallows it in the year of nationalization?

6. Did the Court of Appeals err in adopting the findings of the Tax Court patterned from *Elek*, 30 T.C. 731, that

> "The attitude of the present Hungarian Government toward its own nationals offers little reason to hope that compensation will be forthcoming from it,"

although Elek was a Hungarian citizen at the time of nationalization, and petitioner Paul H. Schweitzer an American citizen?

7. Did the Court of Appeals err in calling "sufficient evidence" the reasoning of the Tax Court that the nationalization of *Elek*'s assets and of Paul H. Schweitzer's assets having been accomplished under the same Hungarian Decree No. 4 of 1952, their losses must have been sustained in 1952 (R. 50)[2] although *Elek* was a Hungarian national, and Paul H. Schweitzer an American national?

8. Did the Court of Appeals err in calling "sufficient evidence" the enunciation at the last page of the opinion of the Tax Court (R. 58):

> "that petitioner did file a claim with the Foreign Claims Settlement Commission under the amended Act of August 9, 1955, for recovery of his *war* losses *which* were *incurred in 1949 and 1952* and was awarded and paid $1,069.42 *has nothing to do with*

[1] Appendix A, 1a.

> *the issue* which we have here to decide—it is irrelevant to the determination *when the losses were incurred,*" (emphasis added),

which contradicts itself?

9. Did the Court of Appeals err by failing to note that the respondent rather off-handed conceded the implication in item 2 on page 4 of Senate Report No. 800, 81st Congress, 1st Session, dated July 28, 1949, that

> "[t]he Committee Report (i.e., the *Senate Report of July 28, 1949*) does state that it remained to await the report and recommendation of the War Claims Commission regarding nationalization claims against countries such as Hungary, * * * " (R. 44).

Statutes Involved

The petition to the Tax Court charged the respondent with an error concerning Section 165(a) of the Internal Revenue Code of 1954, and Sections 1.165-1(d)(2)(i) and 1.165-1(d)(4) of the Regulations under the Internal Revenue Code of 1954.

However, the issues raised involve these additional statutory provisions:

> Sec. 7482(a) of the Internal Revenue Code of 1954;
>
> Secs. 202(a), 202(b), 302, 303 of the International Claims Settlement Act of 1949 as amended.

The provisions of the statute involved are printed in Appendix A, 2a-6a.

Statement of the Case

Paul H. Schweitzer is a retired professor of engineering, a native of Hungary, who became a naturalized

American citizen in 1925; at all material times thereafter, he was an American citizen and resident (R. 49).

Petitioner owned shares of stock, interests in two partnerships, and in real property, all located in Budapest, Hunrary (R. 49, 50). No deductions for war losses were ever claimed by the petitioners under Section 127 of the 1939 Code (R. 52). Upon termination of World War II petitioner's interests in all of said properties were recovered as of January 20, 1945 (R. 50). Neither of petitioner's said interests were alienated or abandoned (R. 53) at any time, nor was petitioner divested of his ownership rights as to any of his properties until their nationalization (R. 53).

The corporation and the two partnerships were nationalized in 1949 (R. 49), and the real property in 1952 (R. 50), all without compensation, pursuant to Decrees Nos. 20 and 4 of the Presidium of the Hungarian People's Republic, issued December 28, 1949 and February 17, 1952 respectively (R. 49, 50). Petitioner filed a claim under the International Claims Settlement Act, in July, 1957, with respect to his nationalized properties (R. 51). On April 13, 1959, the Foreign Claims Settlement Commission of the United States issued a proposed decision, which became final shortly thereafter in 1959 (R. 51), and in the same year petitioner received payments on the said decision in the total and final amount of $1,069.42 (R. 51).

All of these facts were found as facts by the Tax Court, together with the data forming the bases for determining the amount of their losses by nationalization (R. 49-53).

Petitioner was aware of his international claims and he had the intention to exercise them (R. 40, 42).

Reasons for Granting the Writ

The case involves several important and fundamental federal questions which have been decided by the Court below in a way in conflict with applicable decisions of the Supreme Court, and which has so far departed from the accepted course of judicial proceedings, and so far sanctioned such a departure by the Tax Court, as to call for an exercise of this Court's power of supervision.

All of the said conflicts and departures are described in detail below. For example, the Court below based its decision on a nonexistent fact, namely, that

> "[i]n 1955 the United States entered into an agreement for compensation of nationalized property with the Provisional Government of Hungary."

Such an agreement was never made.

The Tax Court based its opinion on a finding

> "that petitioner did file a claim with the Foreign Claims Settlement Commission under the amended Act of August 9, 1955 for recovery of his war losses which were incurred in 1949, and 1952,"

though in the said years the United States was not at war with Hungary. The respondent admitted in his brief that

> "[t] he Committee Report does state that it remained to await the report and recommendations of the War Claims Commission regarding nationalizations claims against countries such as Hungary."

The Court below did not deal with this despite petitioners' request.

In *Boehm* v. *Commissioner*, 326 U.S. 287, the Supreme Court decided that

> **"[s]uch an issue of necessity requires a practical approach, all pertinent *facts* and circumstances being open to inspection and consideration regardless of their objective or subjective nature." (Emphasis added).**

Boehm relied on *Lucas* v. *American Code Co.*, 280 U.S. 445, in which the Supreme Court said that

> "no definite legal test is provided by the statute for the determination of the year in which the loss is to be deducted. The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal test."

It is very significant that *Boehm* points to

> "the consequences of error and other difficulities confronting one who in good faith tries to choose the proper year in which to claim a deduction. But these difficulties are inherent under the statute *as now framed.*" (Emphasis added).

Boehm was decided on November 13, 1945, (*Lucas* on February 24, 1930).

The change of framing of the statute—as foreseen by *Boehm, supra,*—came by Treasury Decision 6445, approved January 12, 1960. Its essence is that if an originally existing claim becomes adjudicated, settled, or abandoned, in such circumstance

> "[w]hether a reasonable prospect of recovery exists with respect to a claim for reimbursement of a loss is a question of fact to be determined upon an examination of all facts and circumstances. Whether or not such reimbursement will be received may be ascertained with reasonable certainty, for example, by a settlement of the claim, by an adjudication of the claim, or by an abandonment of the claim."

In other words, these three enumerated events, adjudication, settlement, or abandonment are especially qualified by the statute as proving a prospect of recovery to be reasonable.

May petitioners add the following for the consideration of the Court:

a) Treasury Decisions are a binding construction of the Tax Law, themselves having the force and effect of the Law, unless in conflict with the statute.[2]

Lucas, supra, emphasizes that

> "[m]uch latitude for discretion is thus given to the administrative board charged with the duty of enforcing the Act. Its interpretation of the statute and the practice adopted by it should not be interfered with unless clearly unlawful."

b) What was adjudicated by the Foreign Claims Settlement Commission was

> "such a claim [which] must be continuously owned by a national of the claimant State from the time the claim arose until the date of its presentation."[3]

Thus the claim which was adjudicated was in existence at the time of the takings.

c) T.D. 6445 very carefully states in its section 1.165-1(d)(4), (Appendix A, 2a) that a taxpayer may treat any loss resulting from a casualty or other event in accordance with the rules then applicable or if he so desires in accordance with the provisions of this paragraph, *i.e.,* 1.165-1(d)(2)(i), (Appendix A, 1a).

Petitioners expressed their desire in their Federal income tax return that their losses resulting from nationalizations should be treated in accordance with the latter paragraph.

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[2] *Maryland Casualty Co.* v. *United States,* 251 U.S. 342.

[3] Conference Report 1475, July 27, 1955 to accompany H.R.6382. United States Congressional & Administrative News 1955, page 2758, Amendment No. 1, further Senate Report No. 1050, July 20, 1955 to accompany H.R.6382, *ibid.,* first paragraph of item 6 on page 2753 (R. 92).

d) The Internal Revenue Service issued Document No. 5174 (9-60).[4] It explains to the broad mass of taxpayers that

> "[s]ettlement, adjudication, or abandonment of the claim are examples of reasonable certainty as to the amount of the claim to be received." (First column of page 5.

> "If a casualty occurred * * * before January 16, 1960, and the amount of the reimbursement you will receive, if any, was not known by the end of the year of the casualty * * *, you may deduct the loss for the year the casualty occurred * * *, or you may deduct it for the year in which the reimbursement is determined, as described above; whichever you prefer." (Second column of page 5).

e) In *Patrick McGuirl, Inc.* v. *Commissioner*, 74 F(2d) 729 (2nd Cir., 1935), cert. den. 295 U.S. 748, a condemnation case, the Court decided that the excess of the award over the basis of the condemned property was taxable not in the year of vesting (1926) but in the year when the final award was paid (1929) "since the amount of the award and interest depended upon the course of future events."

f) Paragraph 1 of Article 29 of the Treaty of Peace with Hungary, entered into force on September 15, 1947[5] confers

> "the right to seize, retain, liquidate or take any other action with respect to all property rights and interests which * * * belong to Hungary or Hun-

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[4] "The purpose of the Internal Revenue Service in issuing this pamphlet is to acquaint you with your rights under the Federal tax laws and to insure that you obtain all the benefits of the deductions to which you are legally entitled as the result of your loss so that you pay no more or less than your correct tax liability." (First paragraph of page 1.) (R. 94).

[5] Thus said Treaty was already in force when petitioners' properties were nationalized on December 28, 1949 and February 17, 1952, respectively.

garian nationals and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary * * *."

This was fortified by the notification to Hungary [6] that the United States desired to keep in force or revive [7] the Treaty of Arbitration between the United States of America and Hungary.[8]

Such a state of facts was enough in itself to constitute a reasonable prospect of recovery.

g) There was a note of protest to Hungary (22 Dept. of State Bull. 399 (1950)) which reads:

> "The Government of the United States informs the Government of Hungary that it holds the Government of Hungary wholly responsible for the payment of adequate and effective compensation for the property rights of American nationals affected by the present edict (i.e. the Hungarian Nationalization Law of 1949) as well as by previous law and decrees."

And

> "EFFECT ON AMERICAN INTERESTS
>
> The effect of the above-quoted note is that the United States Government has, on its own behalf and on behalf of American nationals, espoused the claims for compensation arising out of the nationalization and other seizures of property by the Hungarian Government.

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[6] According to paragraph 1 of Article 10 of the Treaty with Hungary such notification keeps in force or revives the pre-war bilateral treaties with Hungary (R. 97).

[7] United Nations: Treaty Series, Volume 183, No. 2426 (R. 98, 99).

[8] Treaty Series No. 797; 46 Statutes at Large 2349, ratifications exchanged July 24, 1929, proclaimed July 24, 1929 (R. 95 to 97).

> In view of this action, the Department requests that American nationals who may have claims arising out of the nationalization and other seizure of property by the Hungarian Government inform the Department of the details of the losses incurred unless this information has already been placed on record with the Department."

A State Department *request* that American nationals inform it of *the details* of the losses they incurred amounts to a reasonable prospect of recovery for those who suffered such losses.

The Court below and the Tax Court clearly erred in not finding that all of these do give a more-than-reasonable prospect of recovery.

The Court of Appeals erred in assuming the existence of a nonexistent fact as the basis of its decision when it stated that

> **"In 1955 the United States entered into an agreement for compensation of nationalized property with the Provisional Government of Hungary." (Last paragraph of the opinion of the Court of Appeals.)**

The United States never entered into such an agreement with Hungary. This is evident from Section 302 of the International Claims Settlement Act of 1949, as amended:

> "The Secretary of the Treasury shall cover into each of the Hungarian, Rumanian, and Bulgarian Claims Funds, the funds attributable to the respective country or its nationals covered into the Treasury pursuant to subsections (a) and (b) of section 202 of this Act."
>
> "SEC. 202. (a) In accordance with * * * article 29 of the treaty of peace with Hungary, * * * any property which was blocked in accordance with Executive Order 8389 of April 10, 1940, as amended, * * * shall be sold or otherwise liquidated as expeditiously as possible * * *. The net proceeds remaining

upon completion of the administration and liquidation thereof, * * * shall be covered into the Treasury."

"SEC. 202. (b) The net proceeds of any property which was vested in the Alien Property Custodian or the Attorney General after December 17, 1941, pursuant to the Trading With the Enemy Act, as amended, and which at the date of vesting was owned directly or indirectly by Bulgaria, Hungaria, or Rumania, or any national thereof, shall after completion of the administration, liquidation, and disposition of such property * * *, be covered into the Treasury * * *."

The opinion of the Court below then continues:

"Under this agreement, the International Claims Settlement Act of 1949 as amended, 22 U.S.C. Section 1621 *et seq.* (Supplement 1964), Paul Schweitzer filed a claim." (Appendix B, 2b).

"This agreement" obviously means the nonexistent agreement with Hungary, because the International Claims Settlement Act of 1949 as amended does not contain any agreement with Hungary.

This explains the whole basic error: The Court below meant that Paul Schweitzer could not have any claim before 1955, when the supposed agreement was concluded.

The awards upon Yugoslav, Italian, and Soviet claims were based on agreements for compensation of nationalized property, and it is obvious that the Court below thought the same to be the situation with Hungary.

As the International Claims Settlement Act of 1949 as amended is based on the Peace Treaty with Hungary, which came into force on September 15, 1947, i.e., before the nationalizations, by the very argument of the Court below its opinion is erroneous.

May petitioners refer to *Alvary* v. *United States*, 302 F(2d) 790:

> "On fact questions the court should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or are capable of certain verification. See, e.g., *Brown* v. *Piper*, 91 U.S. 37, 42 (1875); *McCormick on Evidence*, chapter 37 (1954)."

The Court of Appeals erred in adopting the findings of the Tax Court patterned from *Elek*, 30 T.C. 731, that

> **"[t]he attitude of the present Hungarian Government toward its own nationals offers little reason to hope that compensation will be forthcoming from it * * *."**

The Court below accepted as "sufficient evidence" the following syllogism of the Tax Court (last paragraph on page 9 of the opinion of the Tax Court, R. 55):

> both Elek's and Schweitzer's property were nationalized by the Hungarian Government under the same decree, No. 4/1952,
>
> therefore there can be no doubt that Schweitzer's case is to be decided as the *Elek* case had been.

Peter S. Elek was a Hungarian national on the date of nationalization.[9]

The facts are true, but the syllogism is erroneous, because section 303 of the International Claims Settlment Act allows claims only of nationals of the United States. Paul H. Schweitzer became a naturalized American citizen on August 31, 1925 (second paragraph, page 3 of the opinion of the Tax Court, R. 49), thus he had a claim and a reasonable prospect of recovery unlike Elek.

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[9] *Peter S. Elek*, 30 T.C. 731, third paragraph on page 732:
"The petitioner is a resident of New York, New York, and is a citizen of the United States naturalized in 1956. He was a Hungarian national * * *."

The Court of Appeals erred in adopting the findings of the Tax Court patterened from *Elek*, that Paul H. Schweitzer would be an incorrigible optimist, if he believed in a reimbursement of his nationalization losses, citing *United States* v. *S. S. White Dental Mfg. Co.*, 274 U.S. 398 (1927).

The Supreme Court of the United States called that taxpayer "an incorrigible optimist" because

> "[t]he sequestration of *enemy property* was *within the rights* of the German Government as a *belligerent power* and when effected, left the [taxpayer] *without right* to demand its release or compensation for its seizure, *at least until the declaration of peace.* What would ultimately come back to it, as the event proved, might be secured *not as a matter of right,* but as a matter either of grace to the vanquished, or exaction by the victor." (Emphasis added).

Both the incorrigibility and the optimism, however, vanished when the Treaty of Peace with Hungary was concluded on September 15, 1947, that is *before the nationalizations*:

petitioner's property was *no more* enemy property;

its sequestration was *no more* within the rights of Hungary;

because Hungary was *no more* a belligerent power;

accordingly the sequestration, when effected, left petitioner *no more* without right to demand its release; or *compensation* for its seizure;

furthermore, what would ultimately come back to petitioner, might be secured as a *matter of right,* and

not as a matter of grace to the vanquished,

nor as an exaction by the victor.

Thus the theory of the "incorrigible optimist" sustains our case, not that of the respondent, and *United States* v. *S.S. White Dental Manufacturing Co., supra,* is fully in point with our case, when it affirmatively states, that peti-

tioner *had a claim* of right, by the fact of, and the very time of the seizures, when it says:

> "* * * left the [taxpayer] without right to demand its release or compensation for its seizure, at least *until the declaration of peace.*" (Emphasis added).

The Court of Appeals improperly and mechanically applied a rule designed for questions of evidentiary facts [10] to inferences and to legal questions.

The basis and essence of the opinion of the Tax Court is expressed on the last page of its opinion as follows:

> "It seems to us that the above stipulated facts showing that petitioner did file a claim with the Foreign Claims Settlement Commission under the amended Act of August 9, 1955, for recovery of his *war* losses *which* were *incurred in 1949 and 1952* and was awarded and paid $1,069.42 *has nothing to do with the issue* which we have here to decide—it is irrelevant to the determination *when the losses were incurred.*" (Emphasis added).

There is no error in the statement of the evidentiary fact that petitioner did file a claim with the Foreign Claims Settlement Commission under the amended Act of August 9, 1955, but the remainder of the sentence is clearly and entirely erroneous. *War* losses were not incurred in 1949 and 1952, because there was no war with Hungary in the said years. Accordingly petitioner did not file and could not file for recovery of his "war losses" he incurred in 1949 and 1952.

The Court below nevertheless stated that

> "The Tax Court, however, on sufficient evidence, found as fact that prior to 1959 the petitioners had no reasonable prospect of recovery for these losses at some future date."

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[10] Rule 52(a) of the Federal Rules of Civil Procedure; Section 7482(a) of the Internal Revenue Code of 1954.

That petitioner's filing of a claim and being awarded and paid a reimbursement for his losses incurred in 1949 and 1952 "has nothing to do with the issue" is no finding of fact, but an entirely erroneous conclusory opinion.[11]

The filing of the claim, the award and its payment related to losses incurred in 1949 and 1952, consequently they had to do only and solely with the issue as to when the losses resulted. Section 1.165-1(d)(2)(i) of the Regulations under the Internal Revenue Code differentiate between the occurrence of an event and a later resulting loss, and it is all too obvious, that they are interrelated and relevant to each other, and determinative of when the losses resulted.

Petitioners requested the Court below to review this flagrant error—but in vain.

Finally the Court of Appeals erred by not drawing the proper conclusion from the rather off-handed admission [12] by the respondent that

> **"The Committee Report [13] does state that it remained to await the report and recommendations of the War Claims Commission regarding nationalizations claims against countries such as Hungary * * * ".**

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[11] The Appellate Courts are limited to a determination of whether the Tax Court's factual inferences and conclusions have any substantial basis in the evidence. (*Helvering* v. *National Grocery Co.*, 304 U.S. 282, 294; *Wilmington Trust Co.* v. *Helvering*, 316 U.S. 164, 168; *Commissioner* v. *Heininger*, 320 U.S. 467, 475; *Dobson* v. *Commissioner*, 320 U.S. 489).

[12] Admissions may also be made in briefs filed, *Joseph C. Stehlin*, T.C. Memo. Op., Dkt. 36436 (1954); *Century Circuit, Inc. of Delaware*, 31 B.T.A. 764; *Peaslee-Gaulbert Co.*, 14 B.T.A. 769; *Murchison Nat. Bank*, 1 B.T.A. 617.

[13] Meaning the second paragraph on page 12 of Senate Report No. 800, 81st Congress, 1st Session, dated July 28, 1949 (R. 44).

The same Senate Report in the same paragraph also says:

> "[n]ationalization measures have occurred in the postwar period in such former enemy countries as Rumania, Hungary, and Bulgaria on a scale no less thorough than in Yugoslavia, Czechoslovakia, and Poland."

The implication of the quoted language in the Senate Report is that it is recognized that confiscations of property of United States citizens occurred in Rumania, Hungary, and Bulgaria which would be dealt with either by amendment to the War Claims Act or by other legislation, depending on the report and recommendation of the Commission.

This is not a hope but it is a *promise by the Senate in its Report of July 28, 1949.*[13]

This promise was fulfilled as to $27 million for Bulgaria, Hungary and Rumania in vested and blocked assets.

It is respectfully submitted that this is nothing less than a reasonable prospect of recovery with respect to the claim for reimbursement of petitioner's losses. Not to recognize this: was clearly erroneous by the Tax Court; and not to remedy this error, was error compounded by the Court below.

CONCLUSION

For all the foregoing reasons, a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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